No. 15,354

United States Court of Appeals

For the Ninth Circuit

A. E. STOKES and ESTELLE STOKES,

Appellants,

vs.

JAMES H. REEVES and ISHAM P. NELSON, JR., doing business as Reeves and Nelson,

Appellees.

Appeal from the United States District Court for the District of Montana, Billings Division

BRIEF OF APPELLEES

FRED N. DUGAN,
213 Electric Building
Billings, Montana

YALE B. GRIFFIS,
207 Empire Bank Building
Dallas, Texas

Attorneys for Appellees

INDEX

TABLE OF AUTHORITIES

Cases

STATUTES

No. 15,354
United States Court of Appeals
For the Ninth Circuit

A. E. Stokes and Estelle Stokes,
Appellants,

vs.

James H. Reeves and Isham P. Nelson, Jr., doing business as Reeves and Nelson,
Appellees.

Appeal from the United States District Court for the District of Montana, Billings Division

BRIEF OF APPELLEES

JURISDICTION

This is an action brought by James H. Reeves and Isham P. Nelson, Jr., Certified Public Accountants, doing business as Reeves and Nelson of Dallas, Texas, against A. E. Stokes and wife Estelle Stokes, residents of Sidney, Montana, in the United States District Court for the District of Montana, Billings Division. Jurisdiction is founded on diversity of citizenship of the parties, and the amount in controversy is a sum in excess of $3,000.00, exclusive of interests and costs (Title 28, U.S.C. Section 1332 (a)(1).

STATEMENT OF THE CASE

In April of 1952, A. E. Stokes found himself in the position of not having filed income tax returns with the Government as far back as 1946. On or about the date of April 16, 1952, the plaintiffs Reeves and Nelson, at Stokes invitation, went to Stoke's home in Gainesville, Texas, and conferred with Stokes about the preparation and filing of his delinquent returns. At this conference Reeves and Nelson accepted this employment. In this initial conversation the terms of the employment were fully discussed and understood and agreed upon by Stokes, i.e., that the amount of the work was considerable and plantiffs expected interim payments (TR 22). That plantiff could not forsee to the dollar how much time it would take, or money it would cost defendant, but told defendant that records ordinarily in pretty good shape would cost around $300.00 per year. That defendant had six years delinquent plus the current year (TR 47-48). That plaintiffs would do defendants' work on the basis of $35.00 per diem (TR 116). That there was no comparison between the difficulty of the work estimated, and the work done, as the seven years work to be done was pitched together in five or six boxes in no particular sequence (TR 52). That the work took a year to prepare and complete (TR 21), and took three certified public accountants a total of 86 days to complete the work and file the returns (TR 28).

Upon the completion of the work and after the returns were filed and accepted by the Government, plaintiff Reeves personally handed defendant Stokes the bill in Reeves' office for plaintiffs services, dated April 3, 1953, invoice No. 2066 (TR 26) in the amount of $2,877.50. That Stokes took the invoice, examined it, made no objection to the same and left the office with it (TR 117). On September 4, 1954, Stokes came to plaintiff's office after he had been sued on the account and made no objection to the amount (TR 117). That Stokes never made any objection to the amount of the bill nor any item thereof, until he came face to face with the proposition that here was

a debt he was being called upon to pay. That plaintiffs received a lot of promises on the part of Stokes, but no money (TR 22). That in addition, plaintiffs sent Stokes a statement through the United States Mail to their P. O. Box in Sidney, Montana (TR 23). Still no objection to the bill, but no money paid thereon other than $250.00 on account, on or about September 15, 1952 (TR 22).

ARGUMENT

1. THE JURISDICTION OF THE COURT — THE JURISDICTIONAL AMOUNT IS MORE THAN ADEQUATE.

Since there is no question as to the diversity of citizenship, we turn at once to the jurisdictional amount in controversy. Here the amount, as alleged by the plaintiffs, is actually $3,788.22. This figure is comprised of $2,877.50, invoice of April 3, 1953, less payment of $250.00, or $2,627.50, plus $400.00 for telephone calls, plus $10.72 travel expense to Gainesville, Texas, and return, plus $750.00 attorneys fees. Plaintiffs' exhibits Nos. 1 (TR 26-27) and 4 (TR 56-57) received in evidence completely set forth these items.

Let us assume only for the purposes of argument that appellants' position, that the amount in controversy is only the $2,627.50 item. Their position completely collapses in the face of the Texas Statute, R.S. 2226, as amended, concerning attorneys fees, as the same constitutes an integral portion of the amount in controversy. The Texas decisions are unanimous on the point, "attorneys fees constituted a part of the amount in controversy so as to confer appellate jurisdiction on the Court of Civil Appeals," *Wichita Valley Ry. Co. v. Leatherwood 170 SW 262.* "Attorneys fees sought to be recovered under this article were not merely 'costs', but were a part of the 'amount in controversy' within the statutes fixing the jurisdiction of Courts", *Houston Packing Co. v. McDonald, 175 SW 806.* The point is also settled in the Federal Courts by a case on "all fours". "In suit in Federal Courts, on sworn account for

materials furnished in the amount of $2,767.45, and $500.00 alleged to be reasonable attorneys fees, dismissed on the ground that the amount in controversy did not exceed $3,000.00, exclusive of interests and costs was error, in view or this article," *Crescent Lumber and Shingle Co. v. Rotherum, C.A., 218 Fed. 2nd 638.*

Now we come to the position of appellant questioning good faith on the part of appellee and raising the question of fraud upon the Court. As appellees view the matter, an individual who is intelligent enough to be in the oil and gas leasing business over a period of years surely must have known that he was required by law to file income tax returns. For six years appellant did not. He knew better. When, as is self evident, from the work performed by appellees, appellant did not file, the cry of "good faith" and "fraud" on the part of appellant somehow have a dull and hollow ring. The plaintiffs made a *prima facie* showing that the amount in controversy was in excess of the $3,000.00 jurisdictional minimum both in Reeves' statement of the amount due and by the introduction of plaintiffs' Exhibit No. 1. "The rule governing dismissal for want of jurisdiction in cases brought in the Federal Court is that, the sum claimed by the plaintiffs controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim." *St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 58 S.Ct. 586, 82 L. Ed. 845; Moehl v. E. I. DuPont DeNemours & Co. 84 F.Supp. 427.* Regardless of the ultimate outcome of this lawsuit, this Court has jurisdiction. *Binderup v. Pathe' Exch. 44 S.Ct. 96, 263 U.S. 291 68 L.Ed. 308; Flanders v. Coleman 39 S.Ct. 472 250 U.S. 223 63 L.Ed. 948; Pacific Electric R. Co. v. Los Angeles, Calif. 24 S.Ct. 586 194 U.S. 112 48 L.Ed. 896.*

II. THE JUDGMENT RENDERED IS AMPLY SUPPORTED BY THE PLEADINGS AND EVIDENCE.

Plaintiffs alleged an action for account in the amount of $3,038.22, in the form prescribed by the Federal Rules.

4 Bender's Federal Practice Forms 226.1

Defendants separately denied the allegations of paragraph II of plaintiffs' complaint by general denial. Under this allegation the plaintiffs made prima facie proof of an account stated, the elements thereof being revealed as follows: Prior business dealings with the defendants; preliminary agreement on the part of the defendants that they were to pay for services rendered by the plaintiffs (TR 22); the making of a payment on account constituting all credits against the account (TR 22); the rendition of account upon final completion of the services by mailing statement to the defendants' usual address and its non-return as indicating receipt (TR 23); the retention of the statement by the defendants under conditions indicating their approval thereof (TR 55, 117); proof of the account stated by carbon copy thereof upon the non-production of the original at the time of trial (TR 25).

By this proof plaintiffs made out a *prima facie* case under the theory of an account slated. Where parties have been engaged in a course of dealings and there is an antecedent indebtedness in favor of one as against the other, and an account or bill purporting to be a statement of the account is rendered by the creditor to the debtor, who retains the same for an unreasonable length of time without objection, this is evidence of the assent of the correctness of the account, and, according is an account stated. *Mutch & Young v. Powers 63 Mont. 437, 443, 207 Pac. 621; Norum v. Ohio Oil Co., 83 Mont. 353, 362, 272 Pac. 534; Thos. O. Hanlon Co., Inc. v. Jess 58 Mont. 415, 418, 193 Pac. 65.* The Montana Rule is that evidence showing an account stated may be admitted, and is sufficient, to support a cause of action on an open account. *Roy v. King's Estate, 55 Mont. 567, 573, 179 Pac. 821; Rogers-Templeton Lumber Co. v. Welch, 56 Mont. 321, 328, 184 Pac. 838; Mutch & Young v. Powers, 63 Mont. 437, 444, 207 Pac. 621.*

III. THE ADEQUACY OF THE JUDGMENT.

(a) The appellees are not aware of any rule of law that states in a contested action that a judgment cannot be rendered for a lesser amount than sued for. Nor are appellees aware of any rule that requires a court to give any reason as to how the court arrived at a certain decision or judgment for a certain amount. This was a trial before the court and he was the exclusive judge of the law and the facts. Appellees do not contest the amount of the judgment of the court below, but do respectfully suggest that if the appellate court revises the amount of the judgment that such revision be upward for the full amount sued for.

(b) As to the interest claim, while interest was not demanded in the Complaint, Mr. Reeves appearing for the plaintiffs was permitted to testify to the amount of interest on the defendant's obligation from the date of rendition of the account stated (July, 1953) to the time of trial. Since there was no objection to this evidence, the Complaint should be deemed amended to permit the recovery of interest in addition to the principal amount of the account stated. *R.C.M. 1947 Sec. 47-124; R.C.M. 1947, Sec. 17-204; Nuhn v. Nuhn 97 Mont. 596, 601, 37 Pac. 2d. 571; Lackman v. Simpson 46 Mont. 518, 525, 129 Pac. 325; Moss v. Goodheart, 47 Mont. 257, 268, 131 Pac. 1071; Rhule v. Thrasher 88 Mont. 468, 477, 295 Pac. 266; Blackweider v. Fergus Motor Co., 80 Mont. 374, 387, 260 Pac. 734; Parsons v. Rice, 81 Mont 509, 264 Pac. 396; Davis v. Claxton 82 Mont. 574, 593, 268 Pac. 787; Ingebrightsen v. Hatcher 87 Mont. 482, 485, 288 Pac. 1023, 1024.*

(c) As to the matter of attorney's fees, plaintiffs alleged in paragraph III of their Complaint the statute of the State of Texas relating to non-payment of claims and the allowance of attorney's fees in addition to the principal amount and claimed that the reasonable value of legal services was $750.00. Defendants in their separate answers made a general denial of this paragraph. At trial the plaintiffs made proof of the Texas Statute, asking the Court to take judicial notice of the Statute

under *Rule 43* of the Federal Rules (TR 29-31). General objection was made by the defendants' counsel to the introduction of this evidence, although he conceded that there was no objection to the competency of the proof.

The law governing the substantive aspects of the cause of action is the law of the forum from which the account stated was mailed and in which the account was to be paid. *1 C.J.S. 695; 15 C.J.S. 880-889.*

Since the cause of action sued on here arose in, and was to be performed in, the State of Texas, the laws of the State of Texas and not the laws of the State of Montana, would govern the right to recover attorney's fees, since the substantive rights of the parties are governed by the *lex loci. Prudential Ins. Co. of Am. v. Carlson, 126 F. 2d. 607, 611.*

State statutes allowing the recovery of attorney's fees in special classes of action have been upheld as constitutional by the United States Supreme Court and they have been given effect in suits brought in the Federal Courts. *People of Sioux County, Nebr. v. National Surety Co. 276 U.S. 238, 48 S.Ct. 239, 240.*

Against the contention that no other costs can be charged in a Court of the United States than those authorized by Federal Statutes, the Supreme Court held that the objection applies only to ordinary costs, and not to allowances for attorney's services provided by state's statutes. *People of Sioux County, Nebr. v. National Surety Co. (Supra).*

(d) Finally the Court below was correct in finding Estelle Stokes jointly and severally liable with her husband A. E. Stokes. She not only received a real benefit from the preparation and filings of her own returns, which were part of the services engaged for by the said defendants, she also received a benefit far beyond what is apparent in the record. If these delinquent income tax returns of A. E. Stokes had not been prepared accurately, and if the same had not been accepted by the Govern-

ment, the seriousness of such a situation would be most obvious. It is not without the realm of possibility that by Government action A. E. Stokes could have been deprived of his liberty for a time and Estelle Stokes deprived of the care, companionship, and company of her husband.

CONCLUSION

For the reason hereinbefore stated the judgment of the District Court should be affirmed.

Respectfully submitted,

FRED N. DUGAN, *Attorney*

YALE B. GRIFFIS, *Attorney*

Attorneys for Appellees

CERTIFICATE OF SERVICE

The undersigned attorney of record for James H. Reeves and Isham P. Nelson, plaintiffs-appellees, hereby certifies that he has on this date sent by mail to Herbert W. Clark, 1110 Crocker Building, San Francisco 4, California, attorney for defendant-appellants, A. E. Stokes and wife Estelle Stokes, four copies of this brief.

Dated at Dallas, Texas, this the 9th day of April, 1957.

Yale B. Griffis

Attorney for Appellees.